Editor's note: 86 I.D. 22

MABLE M. FARLOW
(On Reconsideration after Hearing)

IBLA 75-523 (Supp.) Decided January 11, 1979

Reconsideration after hearing before Administrative Law Judge Ratzman of decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Affirmed.

1. Color or Claim of Title: Generally--Color or Claim of Title: Cultivation--Color or Claim of Title: Improvements

   To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.

2. Color or Claim of Title: Description of Land

   While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports

to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity.

3. Administrative Procedure: Burden of Proof--Color or Claim of Title: Generally

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

4. Color or Claim of Title: Description of Land--Color or Claim of Title: Good Faith

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau, Karnopp & Kennedy, Bend, Oregon, for appellant. Robert H. Memovich, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Mable M. Farlow filed application OR-12944 under the Color of Title Act, December 22, 1928 (45 Stat. 1069), as amended, 43 U.S.C.

§ 1068 et seq. (1970) (hereinafter the Act), on June 27, 1974, for certain land west of the Deschutes River in sec. 12, T. 6 S., R. 13 E., Willamette meridian, Wasco County, Oregon. The deeds in appellant's chain of title described lots 3, 4, and 5 of section 12. On the official survey plat approved in 1883 these lots were shown to lie on the east side of the Deschutes River. That plat also showed a lot 6 on the west side of the river opposite lot 5. A dependent resurvey by the Bureau found that there were omitted lands in section 12 on the west side of the river between lot 6 and the river, and subdivided them. It is the land now designated as lot 8 by the resurvey which appellant claimed was covered by deed descriptions of lot 5, based upon certain maps and other information apart from the official 1883 survey. Appellant contended, in effect, that such extrinsic evidence showed that lot 5 straddled both sides of the river and gave a color of title to the land on the west side of the river. On April 14, 1975, the Oregon State Office, Bureau of Land Management (BLM), rejected the application because no deed or written instrument in appellant's chain of title described land west of the Deschutes River.

Appellant appealed the BLM decision to this Board. On June 7, 1977, we set aside the decision and ordered a hearing to consider "extrinsic evidence to establish whether the deeds in her chain of title were based upon plats, records and other documents which can be read together with the deeds as creating a color of title beyond the actual title shown on an official federal survey plat," and

whether there has been compliance with other requirements of the Act. Mable M. Farlow, 30 IBLA 320, 321, 84 I.D. 276 (1977).

As we stated in our prior decision:

> This case arose because the 1882 survey, * * * erroneously meandered the Deschutes River as flowing through the approximate center of the S 1/2 SE 1/4 of section 12. By lot 5, the river actually curves and flows closer to the east township boundary. A 1972-73 dependent resurvey established new meanders of the river and subdivided the omitted lands in section 12 which are west of the river * * * [into lots 7 and 8]. The position of patented lot 5 is also shown in the SE 1/4 SE 1/4 [on the plat approved in 1974] but east of the river and is much smaller than shown on the 1883 survey plat.

Mable M. Farlow, supra, at 323. 1/

The hearing was held April 26, 1978, in Redmond, Oregon, before Administrative Law Judge Dean F. Ratzman. His proposed findings and recommended determinations were made September 18, 1978. In his recommended decision at page 4, Judge Ratzman sets out further certain facts in this case:

> The chain of title to properties in private ownership begins with a 1904 patent for land described as lots numbered 3, 4 and 5 in Section 12 according to the plat of survey approved in 1883. That survey plat depicts Lot 5 as containing land in the S-1/2 SE 1/4 of Section 12 east

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1/ For a discussion of the rules governing boundaries along a meandered watercourse see the earlier decision, Mable M. Farlow, 30 IBLA 320, 84 I.D. 276 (1977).

> of the river amounting to 30.96 acres. As has been indicated, land in the S-1/2 SE-1/4 which is west of the river is designated on the 1883 plat as Lot 6. [The unpatented portion of the E 1/2 of section 12 was withdrawn from entry in 1908. In 1930, Lot 6 was restored.]
>
> Transfers during 1927-1943 continued the reference to the conveyed lands as Lots 3, 4 and 5. In 1946 Mr. and Mrs. Farlow purchased Lot 5 for $50. The deed recited that mineral rights to any part or parcel lying west [east] of the river were retained by the grantor. [2/]
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> At present there are no improvements on the claimed lands (Exs. 11, 11-A, Tr. 92, 98). The property was utilized to some extent for livestock grazing and raising turkeys. Tr. 92. A portion of the land was cultivated for part of the period between 1953 and 1964 by a tenant. The tenant, Mr. Johnson, paid $300 per year rent to the Farlows. He lived on adjacent Lot 2 during this period of time. Tr. 92, 93.

Judge Ratzman concluded, at p. 9:

> The 1908 withdrawal precludes approval of Mrs. Farlow's application. The applicant has failed to show that the cultivation or improvement requirement has been met. She has not substantiated the assertion that the Farlows and their predecessors in interest, held the lands in good faith under claim or color of title for more than twenty years. The application should be denied.

Appellant and BLM were allowed time in which to respond to the recommended decision. Appellant takes issue with Judge Ratzman's conclusions on three points. First, appellant argues that the land is open to entry and not withdrawn. Second, appellant states that she has met the cultivation or improvement requirement of the Act,

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2/ Judge Ratzman mistakenly said "west" here. The reservation was of rights lying east of the river. 30 IBLA 323.

thereby raising an equity in her favor. Appellant's third argument is that she has established good faith, adverse possession for more than 20 years under claim or color of title.

Our earlier statement that "the land west of the river is public land subject to a color of title application," 3/ was predicated on an assumption that the land was not subject to a withdrawal. The issue of withdrawal was raised for the first time at the hearing. Because of our agreement with Judge Ratzman, otherwise, that appellant has failed to prove her color of title claim, it is unnecessary to decide the effect of the 1908 withdrawal and 1930 restoration of the E 1/2 of section 12 on the omitted land.

[1] The Color of Title Act, 43 U.S.C. § 1068 (1970), directs the Secretary of the Interior to issue a patent

> whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * *.

In 43 CFR 2540.0-5(b), a claim under this provision of the Color of Title Act is called a "class 1" claim. To be entitled to a patent, the claimant must establish that each of the requirements for a class

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3/ Mable M. Farlow, supra at 326.

1 claim has been met. Lawrence E. Willmorth, 32 IBLA 378 (1977); Jeanne Pierresteguy, 23 IBLA 358, 83 I.D. 23 (1976). The record in this case supports Judge Ratzman's conclusion that appellant has not established good faith possession under color of title for more than 20 years, or proved the existence of valuable improvements or cultivation as required by the Act.

On the issue of improvements or cultivation, appellant offered evidence that a small cabin was once placed on the land but in the early 1940's had been moved to other land. To satisfy the Act, the "valuable improvements" must exist on the land at the time the application is filed. Lawrence E. Willmorth, supra; Lena A. Warner, 11 IBLA 102 (1973); Arthur Baker, 64 I.D. 87 (1957). That there was once an improvement on the land which was removed many years prior to the application certainly does not suffice. Id. There was also evidence that appellant rented the land in "the late 1950's and early 1960's" (Tr. 92) for $300 per year and the tenant raised a "crop of grain or hay or something for his horses" and also "a large garden" (Tr. 76). Appellant asserts that this evidence raises an equity in her favor. As Judge Ratzman points out at p. 8:

> Buying land for $50 in 1946, and merely collecting an annual rental of $300 for several years while the renters made an effort to cultivate does not develop an equity -- no facts have been provided as to the area cultivated, yields of hay, grain or vegetables, or any permanent improvement to the land which resulted from the cultivation. Reduction of the land to cultivation in the sense intended in the Act has not been shown.

We agree. Generally throughout the public land law "cultivation" is viewed as a continuing activity with necessary efforts leading to the production of crops. For example, under the homestead laws where cultivation for a period of years has been necessary to meet the requirements for a patent, this Department has consistently ruled that there must be a breaking, planting, or seeding and tillage for a crop to be done in such a manner as to be reasonably calculated to produce profitable results. Acts which did not demonstrate good faith efforts cannot be considered "cultivation" under the law. E.g., Clarence Ray Mathis, 29 IBLA 150 (1977); United States v. Nelson (Supp. I), 28 IBLA 314 (1977); United States v. Garrett, A-31064 (May 28, 1970); Jess H. Nicholas, Jr., A-30065 (October 13, 1964). Here, appellant's application was filed in 1974. From her own evidence, there is no indication of cultivation of the land for at least 10 or more years prior to the filing of the application. Thus, even if we found that land had once been cultivated by appellant's tenants and that would have sufficed under the Color of Title Act to be cultivation at the time crops were being produced, it cannot suffice now. It cannot be said that land "has been reduced to cultivation" where there has been no effort at tillage of the land or other efforts made to produce a crop for at least 10 years. As we indicated that it is necessary to meet the improvement requirement at the time an application is filed, it is also clear that the Act envisages that the land "has been reduced to cultivation" at that time also. We need not decide here whether any breaks in cultivation activity could be accepted. It is sufficient to rule here that where land is not cultivated

at the time the application has been filed and has not been cultivated for 10 years previously, the cultivation requirement of the Color of Title Act has not been satisfied.

[2] We have previously ruled in this case that appellant's good faith adverse possession under claim or color of title for more than 20 years must extend back to the 1939 conveyance from Fischer to Troutman. 4/ We also held that while the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, Manley Rustin, 28 IBLA 205, 83 I.D. 617 (1976); James E. Smith, 13 IBLA 306, 80 I.D. 702 (1973), "extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity * * *." Mable M. Farlow, supra at 329.

[3] The burden of proving a valid color of title claim is upon the claimant. Lawrence E. Willmorth, supra; Jeanne Pierresteguy, supra. The evidence presented at the hearing failed to establish good faith possession under claim or color of title for more than 20 years. Judge Ratzman summarized the evidence as follows:

4/ At 30 IBLA 330 we held: "Appellant and her husband learned of their defective title in 1961 during a lawsuit brought by their grantor to cancel the 1946 deed. Also in 1961, appellant's husband applied for a grazing lease on the lands from the United States. Therefore, appellant's 20-year period of good faith possession must pre-date 1961 and must include the conveyances of March 25, 1939, and June 30, 1943." See Joe I. Sanchez, 32 IBLA 228 (1977).

The only map in evidence that unquestionably was prepared prior to 1965, which shows Lot 5 as being on both sides of the river, is a railroad map. Mrs. Farlow had never seen a homesteading survey plat map of the type referred to in the Statement of Reasons. Tr. 98. Mr. Hunt testified as to blueprints of homestead entries but didn't know who prepared them. He had given them away, but indicated that they may have been prepared by a government agency. Tr. 43, 44.

Mr. Pat McLoughlin of Wasco Title Company, stated in an affidavit in support of Mrs. Farlow's application, that maps of the county Assessor's Office and other public records have shown for at least 50 years that Lot 5 lies on both sides of the Deschutes River. His testimony at the hearing revealed that Mr. McLoughlin had not looked at Wasco County Assessor's maps until 1960. Tr. 13. He had no personal knowledge whether the assessor's maps as of 1951 showed Lot 5 as extending across the river. The so-called "old assessor's map" was examined by McLoughlin for the first time in 1962. Tr. 29. It is his recollection that it showed part of Lot 5 west of the river at that time. However, the map which was attached to the Statement of Reasons (Exhibit 1) contains information which was made available to the public in 1965.

An investigation by B.L.M. Realty Specialist Champ Vaughan, including inquiries at the Assessor's Office, failed to turn up assessor's maps older than 1965. Tr. 131. He was unable to obtain any specific information as to when any maps first showed Lot 5 as being on both sides of the river. Tr. 134. There is no evidence that the railroad map or homesteading survey plat maps were on file in the county records. When he made his recent investigation a 1933 Metsker map showing Lot 5 to be entirely on the east side of the river was on file in the office of the County Assessor. Tr. 119.

County tax records prior to February 1961, showed the assessment either as "Lot 5 EX. 1.20 A R/W 29.76 Acres" (from December 1946 to February, 1961) or as "Lots 3, 4, 5 EX 9.27 A R/W 55.44 Acres" (this notation was used prior to December, 1946). (Exhibits B through B-3). The 29.76 acres land area is the same as the one shown on the 1883 survey map. The record made at the hearing fully supports the following statements in 30 IBLA 330-331.

> "It was not until 1946 that Lot 5 was severed from the entire parcel. From the charts, plats and maps in the record it appears that the error in the placement of the river by the 1883

> survey did not so greatly affect the total acreage of the three lots [3, 4, and 5], which were all on the east side of the river. In comparison, the change in the river's location now shows the area shown on the 1883 plat as lots 3 and 4 to be much larger, with only lot 5 suffering a loss of acreage."

Exhibit B-4, a Wasco County tax record covering entries from February, 1961 through May, 1964, reveals that a change was made during that period, incorporating a reference to a portion of Lot 5 lying west of the river. This change in the tax and assessment document seemingly was made to reflect the fact that the Farlows conveyed to Mr. Hunt a segment of Lot 5 lying east of the river. Thus, it was not until 1961 that the tax authorities gave any indication that they considered part of Lot 5 to be west of the river. 5/

Recommended Dec. 4-5.

Under the Act the lands must have been held in good faith under claim or color of title for more than twenty years. Under the decision of the Interior Board of Land Appeals, the good faith possession of Mrs. Farlow or her grantors, under claim or color of title, must extend back to March 25, 1939, when Gertrude Fischer transferred Lots 3, 4 and 5 to Dorothy Troutman (Exhibit A-3). Mrs. Troutman's husband, A. E. Troutman, acquired and sold land in the Maupin area and was alert and careful in his business dealings. According to his sister-in-law, Mrs. Herrling, he made a careful check before he entered into a business transaction. Tr. 57.

It is the contention of the applicant that it should be presumed that because of Mr. Troutman's habitual care and prudence in land transactions he was aware of the railroad map or other documents which may have shown part of Lot 5 on both sides of the river, and believed that part of the property was on the west side when his wife acquired it in 1939. One could speculate that he acted in that belief when he arranged for the transfer. However, there is as much reason to surmise that by checking the Land

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5/ In any event, the mere paying of State or local taxes on Federal land is not sufficient to support a class 1 color of title claim. See Manley Rustin, supra.

> Office records, or a Metsker map he learned that the official survey showed that land tract entirely on the east side of the river. It is possible that Mr. Troutman made his investigation in 1927 when he first acquired Lots 3, 4 and 5 -- the 1939 Fischer to Troutman transfer was a re-acquisition. It has not been established with certainty that in 1927 the railroad map depicted a portion of Lot 5 lying west of the river. With respect to 1927, the only fact that can be stated with confidence is that information regarding the 1883 survey was available. It has not been proven that either Mrs. Troutman or Mr. Troutman acquired Lot 5 in the belief bonae fidei that part of that lot was on the west side. This is the single greatest deficiency in Mrs. Farlow's case and it requires rejection of the application even if other inadequacies are ignored. [Emphasis in original.]

Recommended Dec. 8-9.

From our review of the record in this case, we find Judge Ratzman's evaluation of the evidence and conclusion correct.

[4] To summarize then, we conclude that it was necessary for appellant's predecessors in her chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, to have had a bona fide basis for believing that lot 5 included land on the opposite side of the river from that shown on the official United States' plat of survey at the time of conveyances to and from them. However, the extrinsic evidence produced at the hearing did not adequately show that there was another lot 5, different from that shown on the United States' plat of survey, which was intended in the conveyances discussed above. Thus, there was

not a good faith holding under color of title for the time required by the Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended determination of Judge Ratzman, so far as consistent with the views expressed herein, is accepted and the application is denied.

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Joan B. Thompson
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge